BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC

In re Final RCRA Permit Evoqua Water Technologies LLC and Colorado River Indian Tribes 2523 Mutahar Street Parker, Arizona 85344 EPA RCRA ID No. AZD982441263	)	Docket No. RCRA Appeal No. 18-01

The Colorado River Indian Tribe's Response to Order for Further Briefing

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Introduction

On December 14, 2018, the Environmental Appeals Board ("EAB") issued an order concerning Evoqua Water Technologies, LLC's ("Evoqua") Motion for Stay of Permit Provisions Pending Board Review, directing Evoqua, the EPA Region 9 ("EPA") and the Colorado River Indian Tribes ("CRIT") to file supplemental briefs to answer three questions pertaining to the EAB's authority to review the EPA's notification of a stay of permit conditions issued pursuant to 40 C.F.R. section 124.16(a):

> 1. May the Board review a Region's notification of a stay of permit conditions issued pursuant to 40 C.F.R. section 124.16(a)?
>
> 2. If the Board may review a Region's notification, what is the appropriate standard of review?
>
> 3. If the Board may not review a Region's notification, what other recourse, if any, does a party have to challenge the notification?

CRIT submits this supplemental brief to address these questions.

Relevant Facts

On November 1, 2018, the EPA filed a notification of a stay of permit conditions pursuant to 40 C.F.R. section 124.16(a) in the appeal of the Resource Conservation and Recovery Act ("RCRA") permit issued to Evoqua and CRIT as co-permittees for a carbon regeneration facility in Parker, Arizona ("Facility"). The notification stayed permit condition I.A.6, among other conditions, pending the EAB's review, but "only as to the status of the tribal government landowner as co-permittee."

On November 14, 2018, Evoqua filed a motion to remand the notification, or alternatively stay the entire permit pending EAB review. Evoqua argues that the stay of permit condition I.A.6 should extend to over 300 permit conditions that refer to the "permittees," alleging that they are not severable from permit condition I.A.6. On November 29, 2018, the EPA filed a response to Evoqua's motion, noting that Evoqua did not contest the other permit conditions and that the other permit conditions were nevertheless readily severable from condition I.A.6. As CRIT was still determining its scope of involvement in this appeal at the time responses were due, CRIT did not file a response to the motion; however, CRIT briefly states its position on the merits of Evoqua's motion in Section IV, *infra*, for the benefit of the EAB and the parties.

Counsel for the parties met and conferred on February 5, 2019 and February 20, 2019. However, the parties were unable to resolve the issues raised by Evoqua's motion or the EAB's specific questions, with the exception of question 2. CRIT understands that the parties concur regarding the appropriate standard of review.

Argument

I. The EAB Lacks Authority to Review the EPA's Notification of a Stay of Permit Conditions.

The EAB has limited power to review actions taken by the EPA pursuant to RCRA. Pursuant to 40 C.F.R. section 124.19(a)(4), a petition for review may only concern a "contested *permit condition* or other specific challenge to the *permit decision*" (emphasis added). In other words, the EAB's review is limited to the substance of the permit, and not the effect of the appeal on on-the-ground conditions.

This limitation on EAB review is supported by the materials establishing the EAB. The EAB was established to review permit appeals and become the "final decisionmaker in Agency adjudications." 57 Fed. Reg. 5320 (Feb. 13, 1992). As discussed in the final ruling establishing the EAB's authority, the legislature expressly intended for the EAB to review appeals of permit and penalty decisions, including appeals from permit decisions made by Regional Administrators under RCRA. 57 Fed. Reg. 5320-21 (Feb. 13, 1992). Significantly, this ruling did not include the authority to review an agency's notification of a stay of permit conditions, which has been expressly delegated to regional administrators under 40 C.F.R. section 124.16(a).

Evoqua has asserted that the EAB is entitled to review the stay decision pursuant to 40 C.F.R. section 124.19(n), which allows the EAB to "do all acts and take all measures necessary for the efficient, fair, and impartial adjudication of issues." However, a close reading of this section indicates that it is not so expansive as Evoqua contends. Subsection (n) permits the EAB to take actions to ensure the *adjudication* proceeds appropriately. This limitation is made clear by the examples of appropriate EAB actions pursuant to this subsection, which include imposing sanctions, relaxing or suspending filing requirements, or striking pleadings. *Id.* These actions all relate to ensuring the *adjudication* is "efficient, fair, and impartial." Consequently, the scope of the EAB's authority under subsection (n) is limited to those actions relating to administration of the proceeding. *Cf. Sacramento Regional County Sanitation Dist. v.*

Reilly, 905 F.2d 1262, 1269 (9th Cir. 1990) (under rule of *ejusdem generis* "general words are read as applying only to other items akin to those specifically enumerated").

Finally, even if the EAB concludes that review of stay orders, as a general matter, falls within the scope of authority granted pursuant to subsection (n), nothing in the record indicates why review of the stay order in this case is necessary to ensure an "efficient, fair, and impartial adjudication." Regardless of the scope of the stay, the EAB can review the petition in an efficient and impartial manner. And to the extent the scope of the stay has any impact on the fairness of the proceeding, it should cut in favor of leaving the stay order unmodified. Evoqua should not be able to delay implementation of the permit, which contains important mechanisms to protect the health and safety of CRIT members, because it believes *the Tribes* were unfairly listed as co-permittees.

II. If the EAB May Review the EPA's Notification, It Should Apply a Clearly Erroneous Standard of Review.

If the EAB nevertheless concludes that it has authority to review the stay notification, the standard of review should be similar to the standard for petitioning for review of a permit decision pursuant to 40 C.F.R. section 124.19(a). Under 40 C.F.R. section 124.19(a)(4)(i)(A), a petition for review can only be successful if it demonstrates that "[a] finding of fact or conclusion of law [] is clearly erroneous."

As the EPA's notice of stayed permit provisions concerned only an application of facts to law, the second potential standard of review—"[a]n exercise of discretion or an

important policy consideration that the [EAB] should, in its discretion, review" (40 C.F.R. section 124.19(a)(4)(i)(B))—is inapplicable to this motion.

III. If the EAB May Not Review the EPA's Notification, a Party May Seek Appeal to Federal Court Only After a Final Agency Action Has Occurred.

If the EAB does not have discretion to review the EPA's notification, Evoqua's only recourse is to seek review in federal court once the EAB has made its final decision on the permit appeal process. 5 U.S.C. § 704 (judicial review available only for "final agency action"; "[a] preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action"); 40 C.F.R. § 124.19(l)(2) (final agency action on a RCRA permit occurs only after EAB review is complete).

CRIT recognizes that, at the point of judicial review, Evoqua's question concerning the appropriateness of the notice of stay will likely be moot. However, this potential unfairness, by itself, does not confer on the EAB authority to review the notice of stay. Many agency actions are not reviewable in any forum. *E.g.*, *Wild Fish Conservancy v. Jewell*, 730 F.3d 791, 800-802 (9th Cir. 2013) (agency's "day-to-day operations" are not reviewable). The fact that Evoqua disagrees with the EPA's stay decision does not automatically provide it with a forum in which to appeal that claim.

CRIT takes no position on EPA's argument that Evoqua may be able to file for reconsideration of the stay notice with the regional administrator.

IV. CRIT Opposes Evoqua's Motion Regarding the Stay.

In its petition for review, Evoqua requested that the EAB review a discrete issue: whether CRIT and Evoqua should be considered "co-permittees" under the final RCRA permit. Based on this limited request, Evoqua now asks to delay implementation of the *entire* permit for the length of time it takes the EAB to consider this appeal. CRIT objects to this request as both unwarranted and unnecessary.

First, as explained by the EPA, the contested permit condition I.A.6 is clearly severable from the remainder of the permit. Evoqua can and should comply with the remainder of the permit's terms without raising the question of whether CRIT must take on the role of co-permittee. *See* Permit Condition I.A.6 ("compliance with such requirements of this Permit by either the Tribe, as beneficial landowner, or the operator is regarded as sufficient for both").

Moreover, CRIT has been working cooperatively with Evoqua to ensure that permit modification applications are reviewed and signed by CRIT in a timely fashion. Evoqua's concern—that permit modification applications may be substantially delayed or impeded (Petition for Review at 7)—is overblown.

Finally, CRIT notes that Evoqua frames its objections to permit condition I.A.6 as a means of protecting CRIT's sovereign status and reducing for CRIT the "onerous task" of reviewing permit conditions. But it is now using these same arguments in favor of delaying implementation of important permit conditions intended to protect

the health and safety of CRIT members. To the extent the EAB reaches the merits of Evoqua's petition, CRIT urges the EAB to reject this attempt.

Conclusion

For the foregoing reasons, the EAB should determine that it does not have discretion to review the EPA' s notification of a stay of permit conditions issued pursuant to 40 C.F.R. section 124.16(a). CRIT urges the EAB dismiss Evoqua's motion.

DATED: February 25, 2019 SHUTE, MIHALY & WEINBERGER LLP

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Statement of Compliance with Word Count Limitation

Sara A. Clark, counsel for the Colorado River Indian Tribes, hereby certifies that this petition complies with the word limit of 40 C.F.R. section 124.19(f)(5) because, excluding the parts of the petition exempted by 40 C.F.R. section 124.19(d)(3), this petition contains 1,601 words.

DATED: February 25, 2019 SHUTE, MIHALY & WEINBERGER LLP

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Certificate of Service

I hereby certify that, on behalf of Colorado River Indian Tribes, a true and correct copy of the foregoing Response to Order for Further Briefing has been served on the following parties via the following methods on this 25th day of February , 2019:

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